

Message Text

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ACTION EUR-25

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NSAE-00 PA-04 RSC-01 PRS-01 SPC-03 USIA-15 TRSE-00

SAJ-01 EB-11 OMB-01 COME-00 DRC-01 /094 W

----- 107427

R 282340Z NOV 73

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TO SECSTATE WASHDC 2933

SECDEF WASHDC

C O N F I D E N T I A L SECTION 1 OF 2 USNATO 5761

E.O. 11652: GDS DEC 79

TAGS: OCON EFIN MCAP NATO

SUBJECT: NADGE - CONTRACTOR'S REQUEST FOR EQUITABLE ADJUSTMENT

STATE FOR EUR/RPM; DEFENSE FOR OASD I&L AND ISA

REF: A. USNATO 5335

B. NPB(AHWG)(CR)-POL/(73)24 (AHWG "FINAL REPORT")

C. STATE 095411

D. USNATO 2197

SUMMARY: NADGE POLICY BOARD (NPB) MET IN JOINT SESSION WITH INFRASTRUCTURE COMMITTEE AND REPS FROM NATIONAL CAPITALS ON 20-21 NOV 73 TO HEAR NADGEMO BRIEF ON NADGECO REQUEST FOR ADDITIONAL PAYMENT. BRIEF ACCOMPLISHED ITS AIM IN SUPPLYING ASSESSMENT OF REPORT AND SUPPLEMENTARY INFORMATION ON FAULTS OF OMISSION OR COMMISSION RELATED TO NADGECO CLAIM. ACTION REQUESTED: GUIDANCE PRIOR TO 25 JAN 74 ON: (A) ACCEPTABILITY OF NPB-SUGGESTED APPROACH TO ACHIEVE SETTLEMENT; AND (B) AMOUNT OF FINANCIAL SETTLEMENT, IF ANY, TO BE OFFERED INITIALLY. END SUMMARY.

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1. NADGEMO BRIEFING (COPY CARRIED TO OSD BY MR. CLAUSSENIUS, I&L, WHO PARTICIPATED) TO NPB, INFRASTRUCTURE, AND NATIONAL REPS WAS GIVEN BY MR. GRUDER, HEAD OF NADGEMO'S BUDGET AND CONTRACTS DIVISION. GRUDER INTRODUCED BRIEF BY STATING THAT

NPB REPORT (REF B) HAD BEEN PURPOSELY TAILORED AS A DEFENSIVE DOCUMENT WHICH COULD NOT BE USED BY THE CONTRACTOR AGAINST NATO IN ANY EVENTUAL THIRD PARTY ARBITRATION OR LEGAL PROCEEDING. THUS WHERE CONTRACTOR ALLEGATIONS COULD BE REFUTED THE REPORT HAS DONE SO; BUT IN CASES OF POSSIBLE OR SUSPECTED NATO FAULT ONLY ADMISSIONS OF THE POSSIBILITY HAVE BEEN MADE. THE GOAL OF GRUDER'S BRIEF WAS TO SUPPLY WITHOUT RECORD OR ATTRIBUTION THE WORKING GROUP'S FINDINGS WHICH MIGHT BE INTERPRETED BY A COURT AS FAVORABLE TO THE CONTRACTOR'S REQUEST FOR EXTRA PAYMENT, SO THAT NATIONAL DECISIONS WOULD NOT BE BASED ON OVEROPTIMISM OF NATO'S CHANCES IN A POSSIBLE LEGAL PROCEEDING.

2. GRUDER OUTLINED FOUR AREAS IN WHICH EVENTUAL ARBITER OR COURT WOULD MOST LIKELY FIND SOME FAULT ON PART OF THE CLIENT (NATO OR THE HOST NATIONS). THESE ARE:

A. LACK OF CENTRAL AUTHORITY IN NATO: THIS PORTION OF THE BRIEF WAS WRITTEN BY THE U.K. REP AND IS NOT CONCURRED IN BY GRUDER NOR SUPPORTED BY THE WORKING GROUP FINDINGS (PART VI, REF B). THE TRUTH MOST PROBABLY LIES BETWEEN THE TWO EXTREME VIEWS AND THE CONTRACTOR CAN BE SHOWN TO HAVE SUFFERED SOME DAMAGE BY REASON OF EXTRA DELAY IN REACHING DECISIONS.

B. PURCHASER FURNISHED EQUIPMENT: EXISTING SITE EQUIPMENT WAS IN MOST CASES DELIVERED TO THE CONTRACTOR IN A CONDITION OTHER THAN THAT FORESEEN BY THE CONTRACTOR. THE RESPONSIBILITY APPEARS TO BE DIVIDED BETWEEN THE CONTRACTOR AND THE CLIENT (NADGEMO AND THE NATIONS).

C. LATE DELIVERY OF TECHNICAL AND SITE DATA: NATO WAS ADMITTEDLY LATE IN DELIVERY OF DATA UNDER THE TERMS OF THE CONTRACT. SOME OF THE DELAY PROBABLY CAUSED DUPLICATION OF CONTRACTOR WORK.

D. EXTRA PERSONNEL TO CONDUCT DISCUSSIONS AND NEGOTIATIONS DURING DESIGN AND IMPLEMENTATION PERIOD: BECAUSE OF THE DIFFERENT VIEWS HELD BY SOME NADGEMO PERSONNEL
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BETWEEN THEMSELVES AND WITH THE HOST NATIONS, THERE WAS UNDOUBTEDLY SOME EXTRA EFFORT REQUIRED BY THE CONTRACTOR. HERE AGAIN NADGEMO PERSONNEL CONTRIBUTED TO THE PROBLEM AND THE RESPONSIBILITY IS PROBABLY DIVIDED.

3. IT WAS GRUDER'S VIEW, BASED ON WORKING GROUP FINDINGS AND KNOWLEDGE OF LONG TERM NADGEMO TECHNICIANS, THAT THE RECOMMENDATIONS BY THE WORKING GROUP (PAGE 9 OF COVER LETTER, REF B) REPRESENTED THE RANGE OF MINIMUM PROBABLE AWARD TO NADGEMO IF CASE WENT TO LITIGATION. IT WAS THEREFORE USEFUL TO ATTEMPT TO SETTLE WITH CONTRACTOR TO SAVE EXPENSE OF LITIGATION WHICH COULD BE EXPECTED TO LAST SEVERAL YEARS, INTEREST ON EVENTUAL AWARD, AND POSSIBLE HIGHER AWARD. HE AGREED WITH THE

WORKING GROUP THAT NO USEFUL PURPOSE WOULD BE SERVED IN ENTERING INTO DISCUSSIONS WITH NADGECO ON THE MERITS OF THEIR INDIVIDUAL ALLEGATIONS IN THE SO-CALLED "BLUE BOOKS" ON WHICH REF B IS BASED. HE SUPPORTED, THEREFORE, THE RECOMMENDED APPROACH OF TRYING TO REACH AGREEMENT WITH THE CONTRACTOR TO SOME PAYMENT FOR EXTRA TIME BASED ON ABNORMAL PRICE ESCALATION AND PAYMENT FOR EXTRA ENGINEERING EFFORT. (THE RECOMMENDATION ON ABNORMAL ESCALATION (PART I, REF B) HAS ALREADY BEEN SUBMITTED TO WASHINGTON AGENCIES AS NADGE/BC/9-1-09/130, 8 FEB 73, AND PRELIMINARY GUIDANCE RECEIVED IN REF C.) PAYMENT FOR EXTRA ENGINEERING EFFORT WOULD BE IN RECOGNITION OF NATO'S RESPONSIBILITY FOR NADGECO'S ADDITIONAL PERSONNEL REQUIRED IN THE AREAS OUTLINE IN PARA. 2, ABOVE. GRUDER SUGGESTS, THEREFORE, THAT A SETTLEMENT BE OFFERED ON THIS BASIS, USING THE TABLE GIVEN ON PAGE 9 OF THE COFER NOTE OF REF B. SINCE THE CONTRACT, FORESEEN AT 4 YEARS, ACTUALLY LASTED 6 1/2 YEARS, NATO COULD OFFER TO ACCEPT RESPONSIBILITY FOR HALF OF THE ADDITIONAL 2 1/2 YEARS AT A COST OF IAU 5.35 MILLION. HE NOTES THAT SUCH A SETTLEMENT WOULD AMOUNT TO SOME 6 PER CENT OF THE IAU 82 MILLION CONTRACT, PROBABLY A RECORD LOW FOR THE NADGE TYPE OF PROCUREMENT. USNATO NOTES, HOWEVER, THAT GRUDER'S SUGGESTION IS AT THE LOW END OF THE RANGE PROPOSED BY THE WORKING GROUP AND EVENTUAL AGREEMENT WITH THE CONTRACTOR ON A SETTLEMENT AND QUIT CLAIM MAY REQUIRE A SIGNIFICANTLY HIGHER OFFER.

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SAJ-01 EB-11 OMB-01 COME-00 DRC-01 /094 W

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C O N F I D E N T I A L SECTION 2 OF 2 USNATO 5761

4. USNATO BELIEVES THAT THE GRUDER/WORKING GROUP APPROACH WOULD BE WORTH TRYING IN ORDER TO SETTLE THE CONTRACTOR'S REQUEST FOR IAU 14 MILLION (HALF OF THE SUM OF PROJECTED LOSSES OF 20 MILLION PLUS UNREALIZED PROFIT OF 8 MILLION). OUR SUPPORT OF THE BASIS FOR CALCULATION OF ABNORMAL ESCALATION IS CONTAINED REF D. THE REMAINDER OF THE CONTRACTOR'S REQUEST IS BASED ON DUPLICATION OF EFFORT, MAINTENANCE OF STAFF FOR LONGER PERIOD

THAN FORESEEN, LONGER WAREHOUSE RENTALS, ETC., TO THE EXCLUSION OF COSTS FOR HARDWARE WHICH WAS ORDERED AND PAID FOR ON THE ORIGINAL SCHEDULE. SINCE THE WORKING GROUP CONCLUDES THAT NATO FAULTS DID NOT CONTRIBUTE TO THE GENERAL SYSTEM DELAY IN THE COMPLETION OF THE NADGE PROJECT, NATO PAYMENT COULD ONLY BE BASED ON PERSONNEL COSTS INCURRED TO REMEDY THE PROBLEMS DISCUSSED IN PARA. 2, ABOVE. NADGECO'S OWN PERSONNEL COSTS DID NOT EXCEED THE ORIGINAL ESTIMATES BECAUSE THE SOFTWARE DEVELOPMENT, AND INSTALLATION AND TESTING OF THE SYSTEM WERE SHIFTED FROM NADGECO TO ITS SUBCONTRACTORS (AND OWNER COMPANIES). SINCE THE ADDED SUBCONTRACTOR EFFORTS CAN BE CONSIDERED TO SUBSTITUTE FOR THOSE FORESEEN TO BE ACCOMPLISHED BY NADGECO, THE ONLY EXTRA REPEAT EXTRA COSTS WOULD APPEAR TO BE THOSE INCURRED IN KEEPING THE OTHERWISE REDUNDANT NADGECO STAFF OCCUPIED IN RESOLVING THE ADDITIONAL PROBLEMS ALLEGEDLY ATTRIBUTABLE TO NATO. AS OFFER TO COVER SOME OF THOSE COSTS, BASED ON NADGECO'S OWN ESTIMATES OF THE COST OF ITS OPERATING BUDGET, WOULD APPEAR TO BE REASONABLE.

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5. SECOND DAY SESSION WAS SPENT IN RESPONDING TO NATIONAL QUESTIONS FOR CLARIFICATION OF BRIEFING AND WORKING GROUP REPORT. MOST SUBSTANTIVE QUESTIONS CONCERNED NATO'S LEGAL OBLIGATION TO SETTLE. GRUDER REPLIED THAT SYG AND COUNCIL HAD AGREED THAT MATTER WOULD BE TREATED IN THE FIRST INSTANCE AS A REQUEST IN EQUITY. AFTER 18 MONTHS OF INTENSE EFFORT THE WORKING GROUP HAS MADE ITS RECOMMENDATION. WHILE EACH NATO COUNTRY IS FREE TO REFUSE OR MODIFY THE RECOMMENDATION, IT WOULD BE A BREACH OF FAITH NOT TO EXAMINE THE RECOMMENDATION AFTER SUCH A LONG DELAY. GRUDER EMPHASIZED THAT HE BELIEVED THAT A CASE IN EQUITY OR IN LAW WOULD RESULT IN AN AWARD TO THE CONTRACTOR AT LEAST IN THE RANGE OF IAU 5-8 MILLION. HE ALSO NOTED THAT THE CONTRACTOR HAD EARNED A MEASURE OF CONSIDERATION BY COMPLETING THE SYSTEM EVEN AFTER HE HAD RECOGNIZED THE PROSPECTIVE IAU 20 MILLION LOSS.

6. THERE WAS MUCH INTEREST IN WHERE FUNDS COULD BE LOCATED TO MAKE ANY PAYMENT WHICH MIGHT EVENTUALLY BE APPROVED. CONSENSUS WAS THAT THE APPROXIMATE IAU 2 MILLION REMAINING IN THE NADGE CEILING WOULD HAVE TO BE SUPPLEMENTED BY FUNDS WITHIN THE INFRASTRUCTURE XII - XV SLICE GROUP. THE CHAIRMAN OF THE PAYMENTS AND PROGRESS COMMITTEE NOTED THAT THERE WERE CURRENTLY IAU 18 MILLION IN UNAUTHORIZED FUNDS FOR SLICES XII - XV AGAINST A LATEST COST ESTIMATE OF IAU 30 MILLION OF PROGRAMMED BUT UNFUNDED PROJECTS. SINCE ANY ADDITIONAL PAYMENT UNDER THE NADGE CONTRACT WOULD CONSTITUTE A SIMPLE COST OVERRUN ON AN ALREADY AUTHORIZED PROJECT, IT WOULD PRESUMABLY HAVE A PRIOR CLAIM ON AVAILABLE FUNDS. THUS ADDITIONAL PROJECTS IN THE AMOUNT OF IAU 3-6 MILLION WOULD HAVE TO BE REPROGRAMMED IN FUTURE SLICES. SEVERAL NATIONS NOTED THAT REVIEW AND REPROGRAMMING REQUIREMENT FOR PROJECs AT LEAST 10 YEARS OLD APPEARED TO BE REASONABLE.

7. NPB AGREED TO ESTABLISH SCHEDULE FOR CONTINUING ACTION
AS FOLLOWS:

(1) 25 JAN 74

NPB MEETING TO CONSIDER NATIONAL VIEWS ON RECOMMENDED APPROACH
TO SETTLEMENT AND SUM TO BE OFFERED.

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(2) MID-FEB

AGREEMENT ON APPROACH AND APPOINTMENT OF NATO SPOKESMAN TO INFORM
NADGECO OF
REASONS FOR ITS ADOPTION AND DETAILS OF APPROACH (WITHOUT FIGURES).
SPOKESMAN WOULD OFFER
TO CONVEY NADGECO'S VIEWS TO NPB OR ARRANGE FOR NADGECO TO
BRIEF NPB.

(3) END MARCH

AGREEMENT TO A FIGURE TO BE OFFERED TO NADGECO. APPOINTMENT OF
SPOKESMAN TO CARRY NEGOTIATING ARGUMENTS BETWEEN NADGECO AND NPB.

(4) END JUNE

AGREEMENT BY NADGECO AND NATO TO SETTLEMENT. FUND REQUEST TO
INFRASTRUCTURE AND P&P COMMITTEE AND PAYMENT TO CONTRACTOR.

8. REQUEST INSTRUCTIONS ON APPROACH AND AMOUNT OF
SETTLEMENT PRIOR TO 25 JAN 74. IF DESIRED, MISSION WILL SEND
REP FOR DETAILED DISCUSSIONS IN EARLY JANUARY.
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Message Attributes

Automatic Decaptioning: X
Capture Date: 02 APR 1999
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: n/a
Control Number: n/a
Copy: SINGLE
Draft Date: 28 NOV 1973
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Authority: boyleja
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1973NATO05761
Document Source: ADS
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: 11652 GDS DEC 79
Errors: n/a
Film Number: n/a
From: NATO
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1973/newtext/t19731165/abqcednn.tel
Line Count: 251
Locator: TEXT ON-LINE
Office: n/a
Original Classification: CONFIDENTIAL
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 5
Previous Channel Indicators:
Previous Classification: CONFIDENTIAL
Previous Handling Restrictions: n/a
Reference: A. USNATO 5335
Review Action: RELEASED, APPROVED
Review Authority: boyleja
Review Comment: n/a
Review Content Flags:
Review Date: 22 AUG 2001
Review Event:
Review Exemptions: n/a
Review History: RELEASED <22-Aug-2001 by boyleja>; APPROVED <10-Oct-2001 by boyleja>
Review Markings:

Declassified/Released
US Department of State
EO Systematic Review
30 JUN 2005

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: NADGE - CONTRACTOR'S REQUEST FOR EQUITABLE ADJUSTMENT
TAGS: OCON EFIN MCAP NATO
To: STATE
SECDEF
Type: TE
Markings: Declassified/Released US Department of State EO Systematic Review 30 JUN 2005